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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

WILLIAM R. POOLE,

Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

On Petition For Writ Of Certiorari To The Colorado Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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37 pp

QUESTIONS PRESENTED

Whether the Petitioner is entitled to the benefits of equal protection under C.R.S. sections 16-8-103(2) and 16-8-103.5(2).

Whether the equal protection clause of the United States Constitution required the Colorado Supreme Court to vacate the Colorado Court of Appeals decision in the instant action which relied upon *People v. Hendricks*, 972 P.2d 1041 (Colo.App. 1998), to deny the Petitioner's Motion for Post Conviction Relief when the *Hendricks* decision was reversed by the Colorado Supreme Court.

Whether due process requires that a Petitioner's Motion for Post Conviction Relief be vacated when the decisions of both the Colorado Court of Appeals and the District Court relied upon *People v. Hendricks*, 972 P.2d 1041 (Colo.App. 1998), was reversed by the Colorado Supreme Court.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review this case as decided below by the Colorado Court of Appeals and the denial of certiorari review by the Colorado Supreme Court.

OPINIONS BELOW

The Opinion of the Colorado Court of Appeals is an unpublished opinion cited as No. 99CA0503 (August 10, 2000), and reprinted in the Appendix ("App.") at App. 1. The decision of the District Court of Las Animas County, Colorado in Case No. 92-CR-08 on the Motion for Post Conviction Relief, Pursuant To Crim.P. 35(c), is reprinted at App. 11. The decision of the Colorado Supreme Court to deny *certiorari* review is an unpublished decision cited as No. 00SC717 (February 20, 2001), and is reprinted at App. 21.

STATEMENT OF JURISDICTION

The Court has jurisdiction to review this petition with respect to this case, pursuant to 28 U.S.C. § 2104. The Order denying the petition for writ of *certiorari* to the Colorado Supreme Court was issued on February 20, 2001.

PROVISIONS INVOLVED

C.R.S. 16-8-103(2):

> If counsel for the defendant believes that a plea of not guilty by reason of insanity should be entered on behalf of the defendant, but the defendant refuses to permit the entry of the plea, counsel may so inform the court. The court shall then conduct such investigation as it deems proper, which may include the appointment of psychiatrists or psychologists to assist a psychologist to examine the defendant and advise the court. After its investigation the court shall conduct a hearing to determine whether the plea should be entered. If the court finds that the entry of a plea of not guilty by reason of insanity is necessary for a just determination of the charge against the defendant, it shall enter the plea on behalf of the defendant, and the plea so entered shall have the same effect as though it had been voluntarily entered by the defendant himself.

C.R.S. 16-8-103.5(2):

> If counsel for the defendant believes that an assertion of the affirmative defense of impaired mental condition should be entered on behalf of the defendant, but the defendant refuses to permit counsel to offer such evidence, counsel may so inform the court. The court shall then conduct such investigation as it deems proper, which may include the appointment of psychiatrists or psychologists to assist a psychologist to examine the defendant and advise the court. After its investigation the court shall conduct a hearing to determine whether evidence of impaired mental condition should be offered at

trial. If the court finds that such a defense is necessary for a just determination of the charge against the defendant, it shall inform the prosecution that such defense shall be asserted at trial by the defendant and shall order the defendant's counsel to present evidence at trial on the defense of impaired mental condition.

STATEMENT OF THE CASE

The Defendant, William Poole, shot and killed a man in a parking lot behind a bar in Trinidad, Colorado. The State charged Mr. Poole with first degree murder on January 17, 1992. Lee Hawke, Mr. Poole's trial counsel, learned that Mr. Poole had a history of severe mental illness and believed that Mr. Poole was insane at the time he committed the crime. Thus, on February 27, 1992, Mr. Hawke advised the court over the defendant's objection that he believed pleas of insanity and impaired mental condition (mental status pleas) should be entered in accordance with sections 16-8-103(2) and 16-8-103.5(2), C.R.S. (1986 Repl. Vol. 8A).

While Mr. Hawke recognized his obligation to raise the mental status defenses over his client's objection, he failed to recognize his duty to support the entry of mental status pleas. Instead, and contrary to what the statutes required, he purportedly followed Mr. Poole's wish that the pleas not be pursued. Thus, Mr. Hawke failed to investigate and present evidence of the extent of Mr. Poole's psychiatric history. In addition, he withheld from the court an expert's report which concluded that Mr. Poole was insane. Because Mr. Hawke failed to present

any evidence to support the mental status pleas, the court declined to enter them. Mr. Hawke also failed to comply with the notice requirements of section 16-8-103.5, and the court therefore disallowed at trial all evidence of Mr. Poole's impaired mental condition. Mr. Hawke's grossly deficient representation thus kept from the jury all evidence of Mr. Poole's insanity and impaired mental condition.

After deliberation, the jury returned a verdict of guilty. The court entered judgment and sentenced Mr. Poole to life imprisonment without the possibility of parole. The Petitioner filed a Motion for Post Conviction Relief pursuant to Colo. R. Crim.P. 35(c). The District Court relied upon *People v. Hendricks*, 972 P.2d 1041 (Colo.App. 1998), to deny the Petitioner's Motion for Post Conviction Relief. (App. 20) The Court of Appeals found that the trial court, in *Hendricks*, had afforded the defendant an adequate hearing under section 16-8-103(2) and section 16-8-103.5(2) and made the requisite findings in support of entering the defendant's plea of not guilty.

Petitioner appealed the decision of the District Court of Las Animas County to the Colorado Court of Appeals. The Colorado Court of Appeals affirmed the District Court's decision, also relying upon *People v. Hendricks*, 972 P.2d 1041, 1044 (Colo.App. 1998). (App. 5)

The Petitioner filed a writ for certiorari review of the Colorado Court of Appeals decision with the Colorado Supreme Court on September 6, 2000. During the pendency of the writ petition before the Colorado Supreme Court, the Colorado Supreme Court reversed the Court of Appeals decision in *People v. Hendricks*, 10 P.3d 1231

(Colo. 2000). The Colorado Supreme Court held that the trial court and court of appeals erroneously applied sections 16-8-103(2) and 16-8-103.5(2). *Hendricks*, 10 P.3d at 1243. The Court reasoned that under the controlling statutes, an individual's interest in autonomously controlling the nature of her defense, provided that the interest is premised on a choice that satisfies the basic rationality test, will predominate over the broader interests of society unless pressing concerns mandate a contrary result. *Hendricks*, 10 P.3d at 1243 (internal citations omitted). Nevertheless, the same court denied the Petitioner's writ for certiorari review of the Colorado Court of Appeals' decision which was based on the earlier, erroneous interpretation of the applicable statutes. (App. 1)

REASONS FOR GRANTING THE WRIT

In the proceedings before the District Court, as well as those before the Court of Appeals, neither correctly interpreted or applied C.R.S. sections 16-8-103(2) or 16-8-103.5(2) in analyzing whether the Petitioner was denied effective assistance of counsel in his underlying murder trial. Both the District Court and the Court of Appeals relied in large part on the Court of Appeals' opinion in *People v. Hendricks*, 972 P.2d 1041 (Colo.App. 1998). Both lower courts deemed counsel's conduct irrelevant because the Petitioner was, pursuant to *People v. Hendricks, supra*, found competent at time of trial and was therefore entitled to determine the entry of his plea.

Following the Colorado Court of Appeals decision in this matter, and during the pendency of the writ petition before the Colorado Supreme Court to review the Colorado Court of Appeals decision, the Colorado Supreme Court in *Hendricks v. People*, 10 P.3d 1231 (Colo. 2000), held that the approach relied upon by the District Court and the Court of Appeals applied an incorrect standard. The Court of Appeals in *Hendricks* adopted the common law approach and examined whether the defendant voluntarily and intelligently waived her right to assert mental status defenses. *See Hendricks*, 972 P.2d at 1044. On review, the Colorado Supreme Court concluded that the Court of Appeals' approach failed to consider the public's interests in not convicting one who lacked the mental capacity to commit the crime. *See Hendricks*, 10 P.3d at 1240.

The Colorado Supreme Court specifically found that the "elements utilized by the trial court and approved by the Court of Appeals are not consistent with the analysis required under § 16-8-103(2)." *Hendricks*, 10 P.3d at 1240. The Colorado Supreme Court held that "consequently, both courts applied erroneous legal standards to make the findings required under that statute." *Id.*

The Petitioner asserts that the identical errors in analysis were committed by both the District Court and the Court of Appeals in his case, since both courts relied in large part on the analysis and holding in *People v. Hendricks*, 972 P.2d 1041 (Colo.App. 1998). The Colorado Supreme Court concluded that "in conducting a **just determination** inquiry under sections 16-8-103(2) and 16-8-103.5(2) . . . must balance the two interests we have

found to drive the legal issue before – the public's interest in not holding criminally liable a defendant lacking criminal responsibility and the defendant's interests in autonomously controlling the nature of her defense." *Hendricks*, 10 P.3d at 1240.

The Colorado Supreme Court reasoned that "this balancing" requires the court to consider "not only the defendant's stated reasons for objecting to mental status defenses the side of the equation partially addressed by the lower court, but also the dependant's mental capacity when the crime was committed." *Hendricks*, 10 P.3d at 1240. In considering these competing interests, the trial court "must consider the viability of a mental status defense by inquiring into the defendant's state of mind at the time of the commission of the offense." *Hendricks*, 10 P.3d at 1240-41.

The Colorado Supreme Court concluded, "in determining whether substantial evidence of a mental status defense exists, the trial court must be able to review a complete, neutral mental evaluation performed by a qualified expert who advises the court on the mental state of the defendant at the time of the commission of the offense." *Hendricks*, 10 P.3d at 1240. The Petitioner's allegations of ineffective assistance of counsel went directly to counsel's failure to make available to the court a complete record of his psychiatric history. The Colorado Supreme Court's decision makes it clear that a trial court cannot comply with section 16-8-103(2) without having "a complete, neutral mental evaluation performed." If, as here, defendant's counsel has not provided to the qualified expert the defendant's complete record, then such

actions clearly implicate a claim of ineffective assistance of counsel.

The Petitioner's trial counsel essentially acquieced to the wishes of his insane client and presented absolutely no evidence to support the entry of the mental condition defenses to the court. Trial counsel failed to provide a psychiatric report, which trial counsel possessed, which indicated that the Petitioner was insane at the time of the commission of the murder. Trial counsel failed to call the state psychiatrist as a witness and made no efforts to impeach the state psychiatrist's report. He failed to call any of the psychiatrists who had evaluated and treated the Petitioner during the previous 34 years or offer any of those records into evidence. He failed to call family members who could testify about the Petitioner's mental condition. The only evidence before the trial court was the report of the state psychiatrist, a report that was based upon intentional misrepresentations by the Petitioner, regarding his psychiatric history.

The State Supreme Court's decision in *Hendricks* makes it clear that "the individual's interest in autonomously controlling the nature of his defense . . . will predominate over the broader interests of society **unless pressing concerns mandate a contrary result.**" 10 P.3d at 1243 (internal citations omitted). The Colorado Supreme Court held that in order for a trial court to make the "just determination" required under sections 16-8-103(2) and 16-8-103.5(2), it must balance both the public interest and the individual interest. *See Hendricks*, 10 P.3d at 1243. Therefore, just as in *Hendricks* based upon the Colorado Supreme Court's interpretation of sections 16-8-103(2) and 16-8-103.5(2) the Petitioner should be entitled to a new trial.

Petitioner contends that C.R.S. sections 16-8-103(2) and 16-8-103.5(2) are statutes clearly intended to protect a special class of criminal defendants. The Petitioner, as was Mrs. Hendricks, is a member of that specially protected class. The Colorado Supreme Court's refusal to grant *certiorari* or to enter an order vacating the Court of Appeals' decision in this matter based upon the holding in *Hendricks v. People* denies the Petitioner equal protection under the law. The Petitioner was convicted because the trial court failed to evaluate defense counsel's conduct. Mrs. Hendricks' conviction occurred under identical circumstances.

In light of the District Court's and Court of Appeals' failure to apply the correct legal analysis in the Petitioner's case, the State Supreme Court should have, pursuant to the Equal Protection Clause of the United States Constitution, vacated the Court of Appeals and District Court decisions. The Petitioner's case should have been remanded to the Trial Court with directions to conduct an inquiry consistent with the holding in *Hendricks v. People*. The Colorado Supreme Court afforded the benefit of sections 16-8-103(2) and 16-8-103.5(2) to Mrs. Hendricks. The Colorado Supreme Court failed to ensure that the Petitioner received equal protection under the same laws.

In *Lassiter v. Department of Social Services of Durham County, North Carolina*, 452 U.S. 18 (1981), the Court held that:

> [f]or all its consequence, due process has never been, and perhaps can never be, precisely defined. [U]nlike some legal rules this Court has said, due process is not a technical conception with a fixed content unrelated to time, place and

> circumstances. Rather, the phrase expresses the requirement of fundamental fairness, a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what fundamental fairness consists of in a particular situation by **first considering any relevant precedents** and then by assessing the several interests that are at stake. *Id.* at 24 (*Emphasis added*) (internal citations omitted).

Thus, this Court has acknowledged that due process requires a court to consider relevant precedent in order to provide fundamental fairness as the foundation of the Due Process Clause. A court's failure to follow precedent constitutes a denial of procedural due process. In *Toscano Gil v. Trominski*, 210 F.3d 470, 473-474 (5th Cir. 2000), the court held that an abuse of discretion standard should apply to procedural due process claim based on the BIA's failure to follow or distinguish precedent.

In *Gall v. Parker*, 231 F.3d 265, 304 (6th Cir. 2000), the court held that due process precluded the federal habeas court from ignoring state-court precedent. Adherence to precedential opinions is a requirement under the Due Process Clause. *See Id.* This Court has held that the Equal Protection Clause does not create any substantive rights, but rather embodies the general rule that states must treat like cases alike, but may treat unlike cases accordingly. *See Vacco v. Quill*, 521 U.S. 793, 798 (1997).

The Petitioner's motion for post conviction relief was denied by both the District Court and the Colorado Court of Appeals on the basis of *People v. Hendricks*, 972 P.2d

1041 (Colo.App. 1998). During the pendency of the Petitioner's appeal to the Colorado Supreme Court, that Court reversed *People v. Hendricks*. The principles of fundamental fairness require that the post conviction relief action denial of the District Court must be vacated since the denial was based upon *People v. Hendricks* which was overruled by the Colorado Supreme Court. The Petitioner seeks equal protection under the law. The Equal Protection Clause commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

CONCLUSION

For the foregoing reasons, the writ of *certiorari* should be granted.

Respectfully submitted,

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COLORADO COURT OF APPEALS August 10, 2000
No. 99CA0503 **NOT SELECTED FOR PUBLICATION**

The People of the State of Colorado,

Plaintiff-Appellee,

v.

William R. Poole,

Defendant-Appellant.

Appeal from the District Court of
Las Animas County
Honorable Jesse Manzanares, Judge
No. 92CR8

Division II ORDER AFFIRMED
Opinion by JUDGE PLANK
Erickson* and Pierce*, JJ., concur

Ken Salazar, Attorney General, Paul Koehler, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Larry Pozner, Denver, Colorado; McKenna & Cuneo, L.L.P., Kimberly B. Turnbow, Denver, Colorado; Carpenter, Chartered, Elizabeth B. Wright, Topeka Kansas, for Defendant-Appellant

Defendant, William R. Poole, appeals an order of the trial court denying postconviction relief. We affirm.

* Sitting by assignment of the Chief Justice under provisions of the Colo. Const., art. VI, Sec. 5(3), and § 24-51-1105, C.R.S. 1999.

Defendant was convicted of first degree murder for shooting a man in Trinidad, Colorado. Defendant had suffered from paranoid schizophrenia with violent manifestations since adolescence, for which he had been treated with varying degrees of success for approximately thirty years at the time of his offense.

Prior to trial, defendant's attorney, pursuant to §§ 16-8-103(2) and 16-8-103.5(2), C.R.S. 1999, informed the court that he believed that defendant should enter a plea of not guilty by reason of insanity, and that he should assert the affirmative defense of impaired mental condition, but that defendant objected to the plea and the defense because, among other reasons, he believed the shooting had been in self-defense and that he was not insane or mentally impaired. After conducting the investigation and hearing required by statute in such circumstances, the trial court determined that defendant was competent to stand trial, and therefore justice did not require the entry of such a plea or the use of such a defense over defendant's objections.

Defendant was ultimately convicted and sentenced to life in prison without parole. This court affirmed the conviction upon direct appeal. *See People v. Poole*, (Colo. App. No. 92CA1807, March 17, 1994) (not selected for official publication).

Defendant then brought a motion for postconviction relief, asserting ineffective assistance of counsel. After a hearing, the trial court denied the motion, and defendant now appeals that denial.

I.

Defendant first contends that the trial court erred in its investigation, the conduct of the hearing, and in its conclusion, in deciding whether a plea of not guilty by reason of insanity should have been entered, or the affirmative defense of impaired mental condition should have been raised, over his objections. However, because this issue was raised and fully litigated in defendant's direct appeal, we will not address it again here. *See People v. Bastardo*, 646 P.2d 382 (Colo. 1982).

II.

Defendant also contends that the trial court erred when it concluded that he did not receive ineffective assistance of counsel because he was entitled to refuse to plead not guilty by reason of insanity, and to refuse to raise the affirmative defense of impaired mental condition, after it was determined he was legally competent. We disagree.

An attorney's representation constitutes ineffective assistance only if the defendant can show that the attorney's errors fell outside the broad range of professionally competent assistance of counsel, and that but for those errors, the outcome likely would have been different. *People v. Cole*, 775 P.2d 551 (Colo. 1989) (adopting the standard of *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984)).

A.

Defendant, in the first of two related arguments, asserts that defense counsel was deficient in his representation because he did not offer evidence or witnesses in support of a plea of not guilty by reason of insanity. We are not persuaded.

Pursuant to § 16-8-103(2), C.R.S. 1999, defense counsel properly elected to inform the court of his belief that defendant should enter an insanity plea but did not wish to do so. That statutory section provides, in pertinent part, that:

> If counsel for the defendant believes that a plea of not guilty by reason of insanity should be entered on behalf of the defendant but the defendant refuses to permit the entry of the plea, counsel may so inform the court. The court shall then conduct such investigation as it deems proper, which may include the appointment of psychiatrists or psychologists to assist a psychiatrist to examine the defendant and advise the court. After its investigation the court shall conduct a hearing to determine whether the plea should be entered. If the court finds that the entry of a plea of not guilty by reason of insanity is necessary for a just determination of the charge against the defendant, it shall enter the plea on behalf of the defendant. . . .

A competent defendant has a constitutional right to personally decide certain fundamental issues, such as what plea to enter, whether to waive a jury trial, and whether to testify, regardless of the wishes or advice of defense counsel and the wisdom or the unwisdom of that choice. *People v. Moody*, 630 P.2d 74 (Colo. 1981); *People v.*

Curtis, 681 P.2d 504 (Colo. 1984); *People v. Hendricks*, 972 P.2d 1041, 1044 (Colo. App. 1998).

The supreme court has determined that § 16-8-103(2), although it appears to abrogate that fundamental constitutional right of a competent defendant, is facially constitutional because it furthers an overriding and legitimate state interest in protecting the public welfare and the welfare of insane persons. *Les v. Meredith*, 193 Colo. 3, 561 P.2d 1256 (1977); *but see People v. Hendricks, supra* (a competent defendant is always entitled to determine what plea to enter, regardless of counsel's advice).

The statute authorizes an insanity plea to be entered by the court over the defendant's objection only if the matter is first raised by defense counsel; the trial court may not enter such a plea *sua sponte*. *Labor v. Gibson*, 195 Colo. 416, 578 P.2d 1059 (1978).

There is a sharp distinction between incompetence and insanity, and a defendant who was legally insane at the time of the offense, or seven at the time of trial, may nevertheless be competent to participate in the defense and to assert or waive constitutional rights. *People v. Benns*, 641 P.2d 298 (Colo. App. 1981).

To be incompetent, the accused must be "incapable of understanding the nature and course of the proceedings against him or of participating or assisting in his defense or cooperating with his defense counsel." Section 16-8-102(3), C.R.S. 1999. Incompetence is a procedural matter, which delays the proceedings until the accused can be rendered competent to stand trial. *People v. Gillings*, 39 Colo. App. 387, 568 P.2d 92 (1977).

In contrast, to be not guilty by reason of insanity, the finder of fact must determine that the accused was "so diseased or defective in mind at the time of the commission of the act as to be incapable of distinguishing right from wrong with respect to that act." Section 16-8-101(1), C.R.S. 1999. If the accused was legally insane at the time the act was committed, such constitutes a complete defense to the charges but requires the defendant to be committed indefinitely to the state psychiatric hospital. *People v. Gillings, supra.*

Defendant now argues that counsel had a continuing duty to support the entry of that plea with evidence and argument once the provisions of § 16-8-103(2) had been invoked, and that counsel's failure to do so was outside the bounds of professionally competent representation. We are not persuaded.

We note initially and in passing that defendant did not contend in the trial court, and does not contend here, that he was incompetent at any time during the proceedings. The record reveals that each expert who evaluated defendant opined that he was legally competent and, based upon those opinions as well as Its own observations of his demeanor, discourse, and behavior in court, and the other evidence available, the trial court found defendant to be competent.

The statute permits, but does not require, defense counsel to inform the court when it appears the defendant does not wish to enter an insanity plea but, in counsel's opinion, should do so. *See* § 16-8-103(2), C.R.S. 1999 ("counsel *may* so inform the court"). The court, and not defense counsel, must then conduct an investigation

and hold a hearing to determine if an insanity plea is necessary for a "just determination of the charge," and, if so, the court must then enter the insanity plea against defendant's wishes.

Contrary to defendant's argument, the statute does not expressly or implicitly require defense counsel to advocate against a client's wishes during the mandatory investigation and hearing. Instead, the statute places the burden squarely upon the trial court to perform the investigation and to determine if justice requires the entry of an insanity plea over the accused's objections. If we were to construe the statute as requiring defense counsel to advocate and otherwise act against the client's wishes, such a construction would conflict with the constitutional right of the accused, if competent, to enter any plea regardless of counsel's advice, would abrogate the duty of loyalty owed to the client by defense counsel, and, in most cases, would violate the attorney-client privilege and defense counsel's duty of confidentiality to the client. Such a burden would seriously undermine, if not completely destroy, the trust necessary to an effective attorney-client relationship, regardless of the ultimate decision of the trial court.

Accordingly, we construe the statute as written, placing the burden to investigate upon the trial court and not upon defense counsel, which avoids such conflicts and avoids any question of whether the statute is constitutional as applied to defendant. We therefore hold that defense counsel has no continuing duty to advocate against a client's wishes after electing to invoke the provisions of § 16-8-103(2), and should not do so.

Hence, we perceive no error in the trial court's conclusion that defendant received effective assistance of counsel when his attorney acceded to his wishes and did not advocate for a plea of not guilty by reason of insanity.

B.

Defendant also contends that defense counsel's representation was deficient because he did not undertake the procedural prerequisites, and did not adequately prepare, to present the defense of impaired mental condition. Again, we are not persuaded.

Prior to trial, defense counsel informed the court, as authorized by § 16-8-103.5(2), C.R.S. 1999, that he believed defendant should raise the affirmative defense of impaired mental condition, in addition to pleading not guilty by reason of insanity, but that defendant also refused to raise that defense. After the mandatory investigation and hearing required by the statute, the trial court declined to rule that justice required that the affirmative defense be pursued against defendant's wishes for the same reasons it declined to order that a plea of not guilty by reason of insanity be entered.

During trial, defense counsel nevertheless attempted to introduce some evidence that would have supported the affirmative defense of impaired mental condition. The prosecution objected, and the trial court sustained the objection on the basis that defendant had not timely raised the defense pursuant to § 16-8-103.5(1), C.R.S. 1999. That section requires that the affirmative defense of impaired mental condition be asserted at arraignment or, for good cause shown in the discretion of the trial court,

at any time prior to trial. Defendant now argues that counsel's failure to present evidence and argument in support of raising that defense over his objections constitutes ineffective assistance of counsel. We are not persuaded.

Section 16-8-103.5(2), C.R.S. 1999, provides that defense counsel may, but is not required to, inform the court when counsel believes the defendant should raise the affirmative defense of impaired mental condition but refuses to do so. The language used is virtually identical to that of § 16-8-103(2), discussed in the previous section.

Defendant now argues that, having so informed the court, defense counsel was required to diligently pursue that defense over his objection until, and unless, the court determined that justice did not require the defense to be raised.

Unlike the entry of a plea, a defendant has no constitutional right to assert any particular affirmative defense regardless of counsel's advice or desires, because the election of defenses is a strategic decision for trial counsel to make after consultation with the client. *See People v. Curtis,* 681 P.2d 504 (Colo. 1984) (criminal defendants have a personal right to decide what plea to enter, whether to testify, and whether to have a jury trial; for all other decisions, trial counsel has the authority to make decisions that are binding upon the accused). In all other respects, our analysis of this contention is the same as for the entry of a plea of not guilty by reason of insanity over the objection of the accused: the statutory language requires the trial court, not defense counsel, to conduct an investigation and a hearing to determine if justice

requires the assertion of the defense over defendant's objection. For the reasons previously stated, defense counsel is not required to, and should not, pursue that defense over a client's objection unless, and until, the trial court determines that justice so requires.

Accordingly, we perceive no error in the trial court's determination that defendant did not receive ineffective assistance of counsel when his attorney did not pursue the procedural prerequisites for asserting the affirmative defense of impaired mental condition, and did not present evidence or argument in favor of asserting that affirmative defense against his client's wishes.

The order is affirmed.

JUSTICE ERICKSON and JUDGE PIERCE concur.

DISTRICT COURT, COUNTY OF LAS ANIMAS, COLORADO
CASE NO: 92 CR 08

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING DEFENDANT'S MOTION FOR POST CONVICTION RELIEF PURSUANT TO CRIM.P. 35(c)

PEOPLE OF THE STATE OF COLORADO
Plaintiff

-vs-

WILLIAM POOLE
Defendant

APPEARANCES: Glenn Davis, District Attorney
Larry Pozner, Esq./ Kenneth M. Carpenter, Esq.
Defendant personally present
(Filed Feb. 2, 1999)

THIS MATTER is before the Court for resolution of Defendant's Motion For Post Conviction Relief Pursuant To Crim.P. 35(c) Defendant claims to have received ineffective assistance of counsel in his prior representation, which resulted in a conviction of first degree murder, and a sentence to the Colorado Department of Corrections for a term of life without eligibility for parole.

Defendant asserts that defense counsel failed to meet the standard of a reasonably competent attorney in this case because he failed to file a pleading or an adequate oral plea fully articulating the factual basis justifying entry of a plea of not guilty by reason of insanity, and

impaired mental condition over objection by the defendant. Defendant also claims that defense counsel failed to engage in appropriate investigation of the psychiatric records of the defendant which could be used to support the assertion of these two defenses over the objection of the defendant.

Defendant also asserts that defense counsel failed to meet the standard of a reasonably competent attorney in this case because he failed to provide the Court with the known expert opinion stating that defendant was insane at the time of the commission of the crime. Finally, defendant also claims his attorney failed to render effective assistance of counsel by failing to agree during the proceedings the right of defense counsel to assert that the defendant had waived any privilege.

THE COURT heard testimony of witnesses in open court and heard statements and arguments of Counsel, and read the appellate transcript.

BEING fully advised in the premises, the Court enters the following Findings Of Fact, Conclusions Of Law, and Order Denying Defendant's Motion.

FINDINGS OF FACT

1. Defendant was charged and convicted by a jury, of first degree murder, C.R.S. 18-3-102, as the result of a shooting in Las Animas County on January 14, 1992.

2. Defense counsel was privately hired, and entered his appearance several days after the filing of charges. Defense counsel was an experienced criminal defense

attorney, having handled numerous homicide cases and cases involving issues related to mental illnesses.

3. Defendant William Poole, has a history of severe mental illness, dating from at least age 13. Defendant also had an extensive prior history of criminal activity, and abuse of alcohol. Defense counsel learned of these histories upon his entry into the case. In part, defense counsel was provided information about the defendant by Kenneth M. Carpenter, Esq. who appears in this proceeding and appears to have represented the defendant in various other matters over the years.

4. Early in the case, defense counsel came to believe that defendant had an extensive history of mental illness, had been diagnosed a paranoid schizophrenic, and may have been insane at the time of the commission of the crime charged in this case. Also, defense counsel came to believe that insanity was the preferred defense. Defense counsel tendered a plea of "not guilty by reason of insanity" on behalf of the defendant. Counsel informed the Court that the defendant objected to entry of a plea of "not guilty by reason of insanity". Defense counsel hired an expert in mental health issues to render an opinion about the defendant's mental condition.

5. The trial court made a preliminary finding that defendant was competent, advised the defendant pursuant to *People v. Branch* 805 P.2d 1075 (Colo.1991), referred defendant to Colorado Mental Health Institute at Pueblo for evaluation, and scheduled a hearing to determine whether the plea of insanity was necessary to a just determination of the issues in this case.

6. Defendant was examined at the Colorado Mental Health Institute at Pueblo (CMHIP) by a mental health professional who found him to be competent, sane, and not suffering from an impaired mental condition. Defense counsel did not supply this mental health professional with all of the records he was aware existed and which concerned the mental health of defendant; nor did defense counsel interview members of defendant's family.

7. Upon being interviewed by the CMHIP mental health professional, defendant was not completely truthful, and down-played his psychiatric history. As a result of these interviews and other materials considered by the mental health professional, the true picture of defendant's past mental health history was not divulged. Defense counsel was aware of this fact but chose not to supply additional information.

8. A mental health professional hired by defendant's counsel reported that, in her opinion, defendant was insane at the time of the commission of the homicide, and that "in my opinion, Mr. Poole continues to demonstrate evidence of these two illnesses. He has been paranoid and dangerous for many years because of his tendency to act on his paranoid thoughts. He understands his charges and has the ability to assist in his defense but in my opinion, he was suffering from a mental illness at the time of the crime and in my opinion, it was the presence of this mental illness that led to his behavior resulting in the death of the victim. Mr. Poole continues to have difficulty understanding the confusion over this case and would like to simply dismiss it as a simple self-defense. In conclusion, it is my opinion that

Mr. William Poole was legally insane at the time of the commission of the crime".

9. At the time of the hearing on the issue of insanity, counsel thought that tactically, insanity would be the preferred defense in the case. However, defendant did not want to assert a plea of insanity. Counsel acceded to defendant's wishes and did not call any witnesses. Counsel likewise did not inform the Court of his expert's conclusion, nor did counsel attempt to invoke the provisions of C.R.S. 16-8-103.5 (2). Defendant, according to his attorney's testimony "forbade me, attorney-client privilege, from disclosing that" referring to the expert's conclusion.

10. At the time of the scheduled hearing on the issue of whether the defense of insanity could be asserted over defendant's objection, defendant told his counsel that he "did not want to go to the state hospital; he did not want to be found insane". Also, that he would rather go to trial and use the self-defense affirmative defense; that if he was found guilty of anything, he would rather spend his time in the penitentiary rather than the state hospital. Defendant and his counsel discussed the trial, the defenses, and defense counsel was told by defendant that, if he was to spend time institutionalized, he wanted it to be in prison instead of a mental institution. One of the reasons was because he could continue his three-pack-a-day smoking habit in prison, but not in a mental institution.

11. After the insanity issue was resolved by a court decision not allowing the sanity plea to be asserted over objection of the defendant, defense counsel attempted to

assert the defense of impaired mental condition. Defendant likewise resisted this effort. At this point, defense counsel abandoned any effort to further assert insanity or impaired mental condition as defenses to the charge of first degree murder.

12. During times herein relevant, defense counsel did not raise the issue of defendant's competency. The Court raised and resolved the issue of defendant's competency. Defendant's expert and the CMHIP mental health professional evaluated defendant as competent. The Court likewise found defendant competent to proceed.

13. The facts of this case suggest that self-defense was a viable defense to the charge filed. At trial, defendant appeared alert, competent and understanding of his predicament and the proceeding, and provided clear and concise testimony on both direct and cross-examination.

14. Throughout this case and up to the trial itself, defense counsel chose not to pursue the defenses of insanity and impaired mental condition, at the direction of the defendant. Defense counsel mounted a vigorous defense at the trial, asserting the affirmative defense of self-defense. Defendant testified at the trial, appearing alert, competent and understanding during the proceeding. The ultimate issues at trial were contested and appeared to the trial court, the undersigned District Judge, that reaching a verdict in this case required ordinary jury deliberations. There was evidence in the record, if believed by the jury, to acquit the defendant, or to find him guilty of manslaughter, second degree murder, or first degree murder.

The Court is unable to find that counsel for the defendant in this case failed to provide reasonably effective assistance of counsel. Rather, the Court finds that counsel had difficult decisions to make concerning how to handle defendant's present dilemma of being charged with first degree murder, and the alternative defense available. Counsel acted in accordance with the expressed desires of a competent client on the fundamental issue of what plea to enter in the case. That important decision having been made, counsel continued to provide effective assistance of counsel to the defendant.

CONCLUSIONS OF LAW

15. A defendant has a constitutional right under both the United States and Colorado Constitutions to receive reasonably effective assistance of an attorney as his or her advocate. U.S. Const. amends. VI, XIV; Colo. Const. art. II, section 16; *Strickland v. Washington*, 466 U.S. 668; 104 S.Ct. 2052, (1984).

16. To obtain relief based on a claim that counsel's representation did not meet constitutional standards, a defendant must satisfy the test adopted by the United States Supreme Court in *Strickland v. Washington*, supra. The *Strickland* test, which our courts have followed, consists of two components: first, whether defense counsel's performance was constitutionally deficient – that is, below an objective standard of reasonableness demanded of attorneys in criminal cases; and second, whether the deficient performance prejudiced the defense such that but for the defense counsel's errors, the result of the trial

would have been different. *See People v. Norman*, 703 P.2d 1261 (Colo. 1985).

17. If a finder of fact determines that defense counsel's performance was not constitutionally deficient, there is no need to consider the prejudice prong of the ineffective assistance test. *People v. Garcia*, 815 P.2d 937 (Colo. 1991).

18. A defendant is competent to proceed in a criminal proceeding if he understands the nature of the proceedings with which he is confronted and possesses an appropriate level of understanding necessary to provide meaningful cooperation and assistance to his attorney, in defending the charges. *Jones v. District Court*, 617 P.2d 803 (Colo. 1980). Here, at times relevant during the proceeding, the Court, the defendant's expert, and the People's expert found or opined that the defendant was competent to proceed.

19. Fundamental decisions regarding what plea to enter, whether to waive a jury trial, and whether to testify on one's own behalf, rest ultimately with the accused. *People v. Moody*, 630 P.2d 74 (Colo. 1981). A defendant who is competent to proceed may decide, for personal or other reasons, not to enter an insanity plea. See *People v. Benns*, 641 P.2d 298 (Colo. App. 1981); *United States v. Marble*, 940 F.2d 1543 (D.C. Cir. 1991); *Frendak v. United States*, 408 A.2d 364 (D.C. App. 1979); *People v. Hendricks*, ___ P.2d ___ (Colo.App., February 28, 1998); *Labor v. George M. Gibson*, 578 P.2d 1059 (Colo. App., 1978). Findings relative to each of the specific instances of alleged ineffective assistance of counsel is unnecessary in this case in view of the significant case law which, in certain

instances requires defense counsel to comply with the demands of his client. Such is the case where defense counsel and the defendant disagree upon the fundamental decision of what plea to enter.

20. An attorney owes a defendant the duties of loyalty, to advocate the defendant's cause, to consult with the defendant on important decisions, and to keep the defendant apprised of significant developments in the case. *Strickland v. Washington*, supra; *Hutchinson v. People*, 742 P.2d 875 (Colo. 1987). Strategic decisions concerning the defense of the case, are within the exclusive dominion of defense counsel after consultation with his or her client. *People v. Tackett*, 742 P.2d 957 (Colo. App. 1987). Here, counsel treaded a fine line in deciding to forego the insanity defense in favor of the affirmative defense of self defense, and in doing so fully complied with the wishes of his client. The case law cited above required that he do so, and in retrospect cannot be equated with rendering ineffective assistance of counsel.

21. In *People v. Hendricks*, supra, a very recent Colorado case, a defendant was allowed to personally enter a plea of not guilty after counsel sought to enter a plea of impaired mental condition over the defendant's objection. The rationale for this decision appears to be that the trial court was satisfied that the defendant was competent to proceed and thus had the right to enter the plea she desired. In this case, both the defendant's expert and the People's expert agreed that defendant was competent to proceed, and the testimony is uncontradicted that for rational reasons, he refused to enter a plea of not guilty by reason of insanity or impaired mental condition.

JUDGMENT AND ORDER

Based upon the foregoing Findings of Fact and Conclusion of Law, the Court finds and determines that defense counsel in this case provided with defendant with reasonably effective assistance, and in accordance with defendant's demands.

Further, that defendant's Post-Conviction Motion For Relief Under 35(c) should be and is, hereby DENIED.

DONE AND SIGNED IN COURT CHAMBERS this 2nd day of FEBRUARY, 1999.

BY THE COURT:

/s/ Jesse Manzanares
JESSE MANZANARES,
District Judge

xc: Glenn Davis, District Attorney
Larry Pozner, Esq./ Kenneth M. Carpenter, Esq.

SUPREME COURT, STATE OF COLORADO
TWO EAST 14TH AVENUE
DENVER, COLORADO 80203

CASE NO.
00SC717

CERTIORARI TO THE COURT OF APPEALS, 99CA503
DISTRICT COURT, LAS ANIMAS COUNTY, 92CR8

Petitioners:

WILLIAM R. POOLE,

Respondents:

THE PEOPLE OF THE STATE OF COLORADO.

ORDER OF COURT

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

[SEAL]

BY THE COURT, EN BANC, FEBRUARY 20, 2001.

JUSTICE MARTINEZ and JUSTICE BENDER would grant as to the following issues:

Whether a defense attorney has an obligation to support a not guilty by reason of insanity plea and an impaired

mental conditions defense at the hearing mandated by sections 16-8-103(2) and 16-8-103.5(2), C.R.S. (1986 Repl. Vol. 8A) after raising such plea and defense over a client's objection.

Whether a defendant is denied effective representation where counsel's errors include withholding relevant evidence from the court and complicity in the presentation of false evidence to the court at the hearing mandated by sections 16-8-103(2) and 16-8-103.5(2), C.R.S. (1986 Repl. Vol. 9A).

cc:

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